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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB08

February 18, 2019

VIA EMAIL

Richard L. Abbott, Esq.
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RE: FOIA Correspondence Regarding the Delaware Department of Natural Resources and Environmental Control

Dear Mr. Abbott:

We write in response to your correspondence submitted on behalf of your client, Mr. Warren E. Reynolds, alleging that the Delaware Department of Natural Resources and Environmental Control ("DNREC") violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA") with regard to your record requests. We treat your correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005(c) regarding whether a violation of FOIA has occurred or is about to occur. For the reasons set forth below, it is our determination that DNREC violated FOIA to the extent that DNREC did not provide records responsive to your request, which are not otherwise exempt under FOIA and do not pertain to the pending case by referencing your client, his easement or access rights, the relocation of the Yorklyn/RR Segment (as defined herein), or otherwise relate to a claim of the pending case. We recommend remediation as outlined below.

BACKGROUND

On November 13, 2018, you requested from DNREC the following records:

All correspondence, emails, memos, plans, drawings or diagrams submitted to DNREC for review and/or approval based on its authority under the State Bond Bill

for development of apartments or other multifamily residential use for any parcel of land which is part of the Yorklyn Valley Master Plan in the year 2018.¹

On Wednesday, December 5, 2018, DNREC's FOIA Coordinator advised that additional time was needed for legal review and that DNREC anticipated providing further response by December 27, 2018. On December 27, 2018, the FOIA Coordinator sent DNREC's final response, stating that the records you requested were exempt from FOIA pursuant to 29 *Del. C.* § 10002(l)(9), which exempts "[a]ny records pertaining to pending or potential litigation which are not records of any court" from the definition of "public record" under FOIA.² You responded to the FOIA Coordinator that day, asserting that the records were unrelated to any pending or potential litigation and that DNREC's response did not support their assertion of the exemption. The FOIA Coordinator explained that your request pertained to a site which was the subject of *Reynolds v. Auburn Village, LLC, et al.*, C.A. No. 2018-0184 TMR. You responded that that litigation involved your client and access easements, but it was not related to the development of apartments on the property which was the subject of your denied request. You further asserted that your client had a direct interest in these documents, and that assertion of the litigation exemption must be narrowly applied to the matters directly related to the litigation.

You filed a Petition with this Office on behalf of your client, alleging that DNREC had too broadly applied the pending or potential litigation exemption. You attached a copy of the complaint in *Reynolds v. Auburn Village, LLC, et al.* ("Complaint") to the Petition. Because the requested documents have no connection to a pending action regarding your client's easement rights, you argued that the requested documents must be produced.

DNREC responded to the Petition on February 1, 2019 ("Response"). In its Response, DNREC asserted that the litigation you referenced was filed by your client to stop the development project of the Auburn Valley Master Plan from proceeding.³ DNREC also alleged that your request was intended as an improper alternative to discovery in the pending litigation.

In your submission dated February 6, 2019 ("Reply"), you asserted that FOIA favors release of records, obligating a public body to demonstrate why particular records are considered non-public; that the broad authority granted to DNREC to oversee this Master Plan should subject it to similar transparency standards as the land use authority that would otherwise oversee it; that the litigation exemption should only be applied to records connected to the litigation cited for exemption; that DNREC mischaracterized Mr. Reynolds' goal for the pending litigation as stopping the development project rather than addressing easement issues; that development of multifamily housing about which records were sought is unrelated to those easement issues and is of interest to your client because Mr. Reynolds owns land that may be affected by development;

¹ Petition.

² *Id.*

³ The parties clarified in their submissions that "Yorklyn Valley Master Plan" refers to the Master Plan that DNREC has labeled the "Auburn Valley Master Plan." See Response; Reply.

that DNREC sought to hide documents and would oppose discovery in litigation; and that the case law requires a nexus between documents requested and pending or potential litigation in order to consider the requested documents exempt from FOIA.

For these reasons, you asked this Office to find that DNREC violated FOIA by improperly applying the pending or potential litigation exemption in response to your request for records.

DISCUSSION

DNREC cited the pending or potential litigation exemption in 29 *Del. C.* § 10002(l)(9) to deny access to the requested documents. Under this exemption, any records pertaining to pending or potential litigation which are not records of any court are exempted from the definition of “public record.”⁴ This Office has acknowledged that the purpose of this exemption is to maintain a level playing field, as “Delaware courts will not allow litigants to use FOIA as a means to obtain discovery which is not available under the court’s rules of procedure.”⁵ “[W]hen parties to litigation against a public body seek information relating to the litigation, they are not doing so to advance ‘the public’s right to know,’ but rather to advance their own personal stake in the litigation.”⁶ Indeed, the exemption applies where litigators or litigants are seeking information that might help them in court.⁷ For the exemption to apply, “there must be a sufficient nexus between the records requested under FOIA and the subject matter of the litigation.”⁸

Here, DNREC and your client are involved in a case regarding your client’s rights to an access easement in proximity to the Auburn Valley Master Plan.⁹ The defendants in the suit are DNREC and two developers involved in constructing residential units in the Auburn Valley Master Plan.¹⁰ Your client claimed access easement rights through a portion of Gun Club Road running from Yorklyn Road to the railroad tracks, which for decades was located on lands owned by NVF, Inc. and was more recently owned by DNREC and one developer party.¹¹ This road segment

⁴ 29 *Del. C.* § 10002(l)(9).

⁵ *Mell v. New Castle County*, 835 A.2d 141, 147 (Del. Super. 2003).

⁶ *Grimaldi v. New Castle County*, 2016 WL 4411329, at *9 (Del. Super. Aug. 18, 2016).

⁷ *Office of the Public Defender v. Delaware State Police*, 2003 WL 1769758, at *2-3 (Del. Super. Mar. 31, 2003).

⁸ *Del. Op. Att’y Gen.* 16-IB15, 2016 WL 3462346, at *4 (June 10, 2016) (citing *Del. Op. Att’y Gen.* 03-IB21, 2003 WL 22669566, at *2 (Oct. 6, 2003)).

⁹ See Petition; Response.

¹⁰ Petition.

¹¹ *Id.*

(referred to in the Complaint as “Yorklyn/RR Segment”) was allegedly realigned without your client’s permission and new access was constructed on different properties (“New Yorklyn/RR Segment”). In the Complaint, your client requested that the Court issue a permanent injunction requiring “DNREC and [developer] immediately reconstruct the Yorklyn/RR Segment and leave it in place permanently, so as to provide Reynolds and numerous other property owners with ingress and egress to the Reynolds Property and other homes from and to Yorklyn Road via the original Gun Club Road alignment between Yorklyn Road and the Railroad Tracks,” or alternatively, establish by a quiet title action “perpetual rights to utilize the New Yorklyn/RR Segment on the lands of [developers].”¹²

The central question is whether a sufficient nexus exists between the records requested and the subject matter of this case.¹³ In its Response, DNREC asserted that “in the midst of an action in the Court of Chancery to halt or reverse the Auburn Valley development project,” your client has attempted to obtain documents related to “that very development project.” You disputed this assertion, noting that the case is only about your client’s easement rights. Although the Complaint includes a request for relief that the defendants restore the Yorklyn/RR Segment to its former location, we cannot discern how this remedy, if granted, will “halt or reverse” the Auburn Valley Master Plan. The Auburn Valley Master Plan is a broad endeavor, which involves “State Park preserves, conservation easements, and residential and economic development.”¹⁴ You have requested certain records “submitted to DNREC for review or approval” for the “apartments or other multi-family residential use,” comprising a portion of the Master Plan.¹⁵ Some of those documents may relate to or have a connection with the pending case, especially due to the subject easement’s proximity to the Master Plan, but we cannot conclude on this record that the full scope of the requested documents would have a sufficient nexus to the pending case.¹⁶

Thus, we find that the pending litigation exemption does not apply to the entire scope of documents requested. However, there may be some documents within that scope of the requested records, which may pertain to the pending case by referencing your client, your client’s easement or access rights, the relocation of the Yorklyn/RR Segment, or otherwise relate to a claim of the pending case.

¹² *Id.*

¹³ *Del. Op. Att’y Gen.* 16-IB15, 2016 WL 3462346, at *4 (June 10, 2016) (citing *Del. Op. Att’y Gen.* 03-IB21, 2003 WL 22669566, at *2 (Oct. 6, 2003)).

¹⁴ Response.

¹⁵ Petition.

¹⁶ The request for records that have been “submitted to DNREC for review or approval” of development at the site is, at least in part, a request for records that would have significant public interest. We encourage DNREC to consider handling access to these records similar to other land use authorities in the State.

CONCLUSION

We find that DNREC violated FOIA to the extent that DNREC did not provide records responsive to your request, which are not otherwise exempt under FOIA and which do not pertain to the pending case by referencing your client, his easement or access rights, the relocation of the Yorklyn/RR Segment, or otherwise relate to a claim of the pending case. To that end, we recommend that in compliance with FOIA's statutory timeframes, DNREC revisit its records responsive to this request and produce a supplemental response thereto, including only those responsive records that are not exempt pursuant to another exemption under FOIA and that do not pertain to your client, his easement access rights, the relocation of the Yorklyn/RR Segment, or otherwise relate to a claim of the pending case.

Very truly yours,



Aaron R. Goldstein
Chief Deputy Attorney General

cc: Ralph K. Durstein, III, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General